

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7357

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

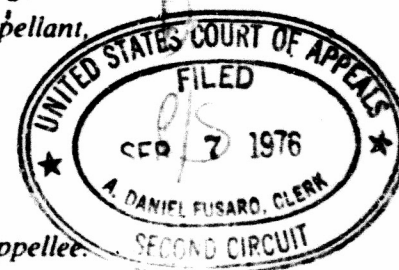
HERZOG & STRAUS, a partnership organized under the laws
of the State of New York,

Plaintiff-Appellant,

-against-

GRT CORPORATION,

Defendant-Appellee.



JOINT APPENDIX

ANDERSON RUSSELL KILL
& OLICK, P.C.

Attorneys for Plaintiff-Appellant

630 Fifth Avenue
New York, New York 10020
(212) 397-9700

ARROW SILVERMAN
& PARCHER, P.C.

Attorneys for Defendant-Respondent

1370 Avenue of the Americas
New York, New York 10019
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(9905)

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CERTIFIED COPY OF DOCKET ENTRIES

A

DIST. OFFICE	YR	NUMBER	MO	DAY	YEAR						
203-01	76	2790	06	24	76	4	320	2	12	630,	0855
										76	279
PLAINTIFFS										DEFENDANTS	

HERZOG & STRAUS, a partnership
organized under the laws of the
State of New York

GRT CORPORATION

CAUSE

d.

Tort-interference with business relationships

ATTORNEYS

Anderson Russell Kill & Olick
630 Fifth Avenue
N.Y.C. 10020
397-9700

Arrow Silverman & Parcher
1370 Avenue of the Americas
N.Y.C. 10019
586-1451

☐ CHECK
HERE
IF CASE WAS
FILED IN

DATE

JUN 24 1976

FILING FEES PAID
RECEIPT NUMBER

077281

C.D. NUMBER

STATISTICAL CA

CARD DATE M/

JSB X
07-19-7

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B

76 Civ 2790 Herzog & Straus

vs. GRT Corp.

76 Civ 2790

DATE NR.

PROCEEDINGS

- 7-24-76 (1) Filed deft's Petition for removal from the Supreme Court of the State of New York, County of New York.
- 6-14-76 (2) Filed Bond undertaking for removal by National Surety Corp. in the sum of \$500.00.
- 7-02-76 (3) Affidavit of P. Parcher in response to affidavit of J. Oshinsky.
- 7-12-76 (4) Filed Memorandum & Order #44741 : Deft's motion for summary judgment is, accordingly, granted. So ordered. Knapp, J. m/n
- 7-15-76 (5) Filed Order that judgment be entered in the deft's favor dismissing; this action with costs & disbursements to be taxed by the clerk, in favor of the deft. & against the plttf. Knapp, J. Judgment Ent. 7-20-76
Clerk m/n
- 7-23-76 (6) Filed plttf's notice of appeal to the USCA from order entered, 7-12-76
Mailed copy to Arrow Silverman & Parcher.
- 7-23-76 (7) Filed Bond undertaking for costs on appeal in the sum of \$250.00 by National Surety Corp.
- 8-03-76 (8) Filed transcript of record of proceeding dated 06-28-76.
- 8-10-76 (9) Filed deft's. memorandum of law in opposition to plttfs. motion.
- 8-10-76 (10) Filed plttfs. memorandum of law in support of motion.
- 8-13-76 (11) Filed notice that the original record on appeal has been certified & transmitted to the U.S. Court of appeals on this 13th day of August, 1976.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By *R. Harrison*
Deputy Clerk

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T.C.

PETITION FOR REMOVAL AND VERIFICATION

1-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERZOG & STRAUS, a partnership)	
organized under the laws of the)	
State of New York,)	
)	
Plaintiff,)	
)	
-against-)	<u>PETITION FOR REMOVAL</u>
)	
GRT CORPORATION,)	
)	
Defendant.)	
	X	

TO THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of GRT Corporation (hereinafter "GRT"), by its attorneys, Arrow, Silverman & Parcher, P.C., for removal of the action from the Supreme Court of the State of New York, County of New York, to the United States District Court for the Southern District of New York, respectfully alleges:

1. Petitioner, GRT is the defendant in a civil action brought in the Supreme Court of the State of New York, County of New York, entitled Herzog & Straus, a partnership organized under the laws of the State of New York, plaintiff, against GRT Corporation, defendant. That action was commenced by the service of a summons and complaint upon a designated representative of GRT in the State of New York on June 18, 1976. In addition, the defendant was served with an Order to Show Cause, returnable on June 24, 1976 for a preliminary injunction. Copies of the Summons and Complaint and the Order to Show Cause with Affidavits are annexed hereto as Exhibits A and B, respectively.

2. The above described action is a civil action of which this Court has original jurisdiction under the provisions of Title 28, United States Code, Section 1332, and is one which

PETITION FOR REMOVAL AND VERIFICATION

-2-

may be removed to this Court by the petitioner, the defendant therein, pursuant to the provisions of Title 28, United States Code, Section 1441, in that it is a civil action wherein the matter in controversy exceeds the value of \$10,000, exclusive of interest and costs, and between citizens of the State of New York as plaintiff and the State of California as defendant.

3. Petitioner is a corporation organized under the laws of the State of California with its principal place of business in Sunnyvale, California. Upon information and belief, plaintiff, at the time this action was commenced, was and still is a partnership organized pursuant to the laws of the State of New York, having its principal place of business in the State of New York.

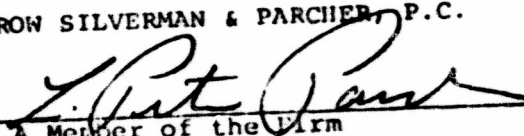
Petitioner files herewith a bond with good and sufficient security, in the sum of Five Hundred Dollars (\$500.00), conditioned as provided by Title 28, United States Code, Section 1416(d), that he will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that this action is not removable or has been improperly removed.

WHEREFORE, petitioner prays that the above action now pending against it in the Supreme Court of the State of New York, County of New York, be removed to this Court.

Dated: New York, New York
June 24, 1976.

ARROW SILVERMAN & PARCHER, P.C.

BY


A Member of the Firm
Attorneys for Defendant
1370 Avenue of Americas
New York, New York 10019
Tel.No. 212/586-1451

PETITION FOR REMOVAL AND VERIFICATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HERZOG & STRAUS, a partnership
organized under the laws of the
State of New York,

Plaintiff,

-against-

GRT CORPORATION,

Defendant.
-----X

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEONARD WARE, being duly sworn, deposes and says:

1. I am a director and the corporate secretary of GRT Corporation. I have read the foregoing petition and know its contents to be true to the best of my knowledge, information and belief.

2. This verification is made by me and not by petitioner because petitioner neither resides in nor maintains an office in New York County, where his attorneys have their offices.


LEONARD WARE

Sworn to before me this
24th day of June 1976.


Notary Public

JOHN M. LARSON
Notary Public, State of New York
No. 37-664,2600
Qualified in New York County
Commission Expires March 20, 1978

**EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT**

C 199-
Personal Service

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**Supreme Court of the State of New York
County of New York**

Index No. 11237/72

Plaintiff designates

New York
County as the place of trial

The basis of the venue is
Plaintiff's residence

Summons

Plaintiff resides at
75 East 55th Street
County of New York

Herzog & Straus, a partnership
organized under the laws of the
State of New York,

Plaintiff

against

GRT Corporation,

Defendant

To the above named Defendant

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney(s) within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, June 18, 1976

Defendant's address:

General Recorded Tape Corporation
2525 Lawrence Station Rd.
Sunnyvale, California

Anderson Russell Kill & Olick, P.C.
Attorney(s) for Plaintiff

Post Office Address
630 Fifth Avenue
New York, New York 10020

EXHIBIT A TO PETITION FOR REMOVAL - SUMMONS AND COMPLAINT

Affidavit of Service

State of New York, County of _____

I, _____, being duly sworn, depose and say, that I present myself as a party to the action, and that I am of age and sound mind, and that on _____, 19____ at New York, New York, I personally served _____, a corporation, with a summons and complaint on _____, the defendant.

I, _____, being duly sworn, depose and say, that I present myself as a party to the action, and that I am of age and sound mind, and that on _____, 19____ at New York, New York, I personally served _____, a corporation, with a summons and complaint on _____, the defendant.

1. ☐ INDIVIDUAL by delivering a true copy of each to said defendant personally. Deponent knew the person so served to be the person described as said defendant therein.

2. ☐ CORPORATION by delivering thereat a true copy of each to _____, a corporation.

personally. Deponent knew said corporation so served to be the corporation described in said summons as said defendant and knew said individual to be _____, thereof.

3. ☐ SUITABLE AGE PERSON by delivering thereat a true copy of each to _____, a person of suitable age and discretion. Said premises is defendant's—actual place of business—dwelling house—usual place of abode—within the state.

4. ☐ AFFIXING TO DOOR, ETC. by affixing a true copy of each to the door of said premises, which is defendant's—actual place of business—dwelling house—usual place of abode—within the state. Deponent was unable, with due diligence to find defendant or a person of suitable age and discretion, thereat, having called there.

MAILING USE WITH 3 OF 4 ☐ Deponent also enclosed a copy of same in a postpaid sealed wrapper properly addressed to defendant at defendant's last known residence, at _____.

and deposited said wrapper in—a post office—official depository under exclusive care and custody of the United States Postal Service within New York State.

Index No. _____

Supreme Court of the State of New York
County of New York

Herzog & Straus, a partnership
organized under the laws of
the State of New York *Plaintiff*

against

GRT Corporation

Defendant

Summons

ACTION NOT BASED UPON
CONSUMER CREDIT TRANSACTION

Anderson Russell Kill & Olick,
P.C.

Attorney(s) for Plaintiff

Office, Post Office Address and Tel. No.

630 Fifth Avenue
New York, New York 10020
(212) 397-9700

DESCRIPTION USE WITH

1 of 3 ☐ Deponent describes the individual served as follows: sex: ☐ male ☐ female;

<input type="checkbox"/> White Skin	<input type="checkbox"/> Under 5'	<input type="checkbox"/> Under 100 Lbs.
<input type="checkbox"/> Black Skin	<input type="checkbox"/> 5'0" - 5'2"	<input type="checkbox"/> 100 - 130 Lbs.
<input type="checkbox"/> Yellow Skin	<input type="checkbox"/> 5'3" - 5'8"	<input type="checkbox"/> 131 - 160 Lbs.
<input type="checkbox"/> Brown Skin	<input type="checkbox"/> 5'9" - 6'0"	<input type="checkbox"/> 161 - 200 Lbs.
<input type="checkbox"/> Red Skin	<input type="checkbox"/> Over 6'	<input type="checkbox"/> Over 200 Lbs.

<input type="checkbox"/> Black Hair	<input type="checkbox"/> 14 - 20 Yrs.
<input type="checkbox"/> Brown Hair	<input type="checkbox"/> 21 - 35 Yrs.
<input type="checkbox"/> Blond Hair	<input type="checkbox"/> 36 - 50 Yrs.
<input type="checkbox"/> Gray Hair	<input type="checkbox"/> 51-65 Yrs.
<input type="checkbox"/> Red Hair	<input type="checkbox"/> Over 65 Yrs.
<input type="checkbox"/> White Hair	
<input type="checkbox"/> Balding	

Other identifying features:

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EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HERZOG & STRAUS, a partnership
organized pursuant to the laws of
the State of New York,

Plaintiff,

-against-

GRT CORPORATION,

Defendant.

VERIFIED COMPLAINT

Index No. 11237/76

Plaintiff for its complaint herein alleges:

1. Plaintiff, Herzog & Straus is a partnership of certified public accountants organized under the laws of the State of New York.

2. Upon information and belief, defendant is a corporation, organized and existing under the laws of the State of California.

FIRST CAUSE OF ACTION

3. In or about April, 1976, plaintiff entered into a business relationship with Arista Records, Inc. ("Arista") to perform an audit of the books and records of GRT Music Tapes ("GRT"), a division of defendant corporation which manufactures music tapes.

4. Upon information and belief, on October 1, 1974, GRT and Bell Records, a division of Capital Pictures Industries, Inc., the predecessor company to Arista entered into a contract

EXHIBIT A TO PETITION FOR REMOVAL-
SUMMONS AND COMPLAINT

whereby GRT would manufacture music tapes for Arista in return for quarterly royalty payments. The contract also provides that a certified public accountant chosen by Arista has the right to audit GRT's books and records to determine that proper royalty payments are being made.

5. Pursuant to the contract between Arista and GRT, on April 19, 1976, Arista sent a registered letter to GRT informing GRT of Arista's intent to audit the books and records of GRT. The letter also gave notice that Arista was authorizing plaintiff, Herzog & Straus, to conduct the audit on behalf of Arista.

6. On April 23, 1976, and again on May 11, 1976, Ira Herzog, on behalf of plaintiff, wrote General Recorded Tape Corporation, the defendant herein, requesting that a mutually convenient date be set for the audit on behalf of Arista.

7. Defendant sent a letter dated May 10, 1976 to plaintiff which stated in relevant part:

"GRT Corporation will not allow your firm access to confidential records that would be necessary for you to conduct such an audit. I have notified Arista and Publishers Licensing of GRT's position and assume they will be making alternative arrangements."
(emphasis added)

8. On May 12, 1976, Arista informed plaintiff that unless plaintiff resolves its disputes with defendant within 90 days, Arista will have no choice but to terminate its business relationship with plaintiff.

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

9. The defendant's sole purpose in refusing to allow plaintiff to examine GRT's books and records is to compel Arista to retain other auditors and thereby maliciously destroy plaintiff's professional business relationships with its clients and its status in the industry.

10. Such malicious interference by defendant was done with the sole purpose of causing injury to plaintiff and cannot, in any way, inure to the benefit of or create a profit for GRT and the defendant.

11. Had plaintiff performed the audit for Arista, they would have received more than \$10,000 in auditing fees.

SECOND CAUSE OF ACTION

12. Repeats and realleges paragraphs 1 through 10 with the same force and effect as if set forth herein.

13. In or about July, 1974, plaintiff entered into a business relationship with Publishers Licensing Corporation ("Publishers") to perform auditing services for Publishers.

14. GRT is licensed to produce tapes of songs owned by Publishers' clients in return for the payment of royalties.

15. Publishers is an agent for publishers of songs and it is the custom in the industry to allow audits to be performed on behalf of such agents for publishers, to determine whether proper royalties are being paid to the publishers.

16. Plaintiff has been requested by Publishers to perform an audit of the books and records of GRT on behalf of Publishers.

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

17. Plaintiff has previously performed audits of GRT's books and records on behalf of Publishers.

18. By letter dated April 23, 1976, plaintiff sent a letter to defendant stating that plaintiff had been requested to perform an audit of GRT's books and records on behalf of Publishers and requested that arrangements be made for such audit on a mutually convenient date.

19. By letter dated May 10, 1976, defendant refused to allow plaintiff to audit GRT on behalf of Publishers.

20. Publishers informed plaintiff that unless plaintiff resolves its dispute with plaintiff, Publishers will have no choice but to terminate its business relationship with plaintiff.

21. The defendant's sole purpose of refusing to allow plaintiff to examine GRT's books and records is to compel Publishers to retain other auditors and thereby to maliciously destroy plaintiff's professional business relationships with its clients and its status in the industry.

22. Such malicious interference by defendant is done with the sole purpose of causing injury to plaintiff and cannot, in any way, inure to the benefit of or create a profit for GRT and the defendant.

23. Had plaintiff performed the audit for Publishers, it would have received more than \$10,000 in auditing fees.

THIRD CAUSE OF ACTION

24. Repeats and realleges paragraphs 1 through 10 and 13 through 22 with the same force and effect as if set forth herein.

**EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT**

25. In or about July, 1974, plaintiff entered into a business relationship with Chrysalis Music Corporation ("Chrysalis") to perform auditing services for Chrysalis.

26. GRT is licensed to publish songs owned by Chrysalis in return for the payment of royalties.

27. Chrysalis is a publisher of songs and it is the custom in the industry to allow audits to be performed on behalf of publishers to determine whether proper royalties are being paid to publishers.

28. Plaintiff has been requested by Chrysalis to perform an audit of the books and records of GRT on behalf of Chrysalis.

29. Plaintiff has previously performed audits of GRT's books and records on behalf of Chrysalis.

30. Ira Herzog, a partner in plaintiff, is Secretary and Treasurer of Chrysalis.

31. By letter dated April 23, 1976, plaintiff sent a letter to defendant stating that plaintiff had been requested to perform an audit of GRT's books and records on behalf of Chrysalis and requested that arrangements be made for such audit on a mutually convenient date.

32. Defendant has not responded to the request to permit plaintiff to perform the audit on behalf of Chrysalis. However, by letter dated May 10, 1976, defendant has refused plaintiff access to GRT's books and records necessary to perform audits making it impossible for plaintiff to perform the audit on behalf of Chrysalis as well as Arista and Publishers.

EXHIBIT A TO PETITION FOR REMOVAL-
SUMMONS AND COMPLAINT

33. As a result of defendant's refusal to permit access to GRT's books and records, Ira Herzog, as Secretary and Treasurer of Chrysalis, will have no recourse but to fire his own accounting firm, the plaintiff herein.

34. The defendant's sole purpose of refusing to allow plaintiff to examine GRT's books and records is to compel Chrysalis to retain other auditors and thereby to maliciously destroy plaintiff's professional business relationship and its status in the industry.

35. Such malicious interference by defendant is done with the sole purpose of causing injury to plaintiff and cannot, in any way, inure to the benefit of or create a profit for GRT and the defendant.

36. Had plaintiff performed the audit for Chrysalis, it would have received more than \$10,000 in auditing fees.

FOURTH CAUSE OF ACTION

37. Repeats and realleges paragraphs 1 through 10, 13 through 22 and 25 through 35 with the same force and effect as if set forth herein.

38. Plaintiff's primary business is the auditing of various companies of the music industry in order to insure that royalty payments that are required to be made to plaintiff's clients pursuant to contracts have been properly calculated.

39. By embarking on a course of conduct to prevent plaintiff from performing work for its clients and by engaging in acts and practices which have damaged plaintiff in its business,

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

plaintiff has sustained losses and will suffer the loss of a substantial portion of its present clientele and the loss of potential business.

WHEREFORE, plaintiff requests relief as follows:

1. With respect to the first cause of action, \$10,000 in compensatory damages.
2. With respect to the second cause of action \$10,000 in compensatory damages.
3. With respect to the third cause of action, \$10,000 in compensatory damages.
4. With respect to the fourth cause of action, \$100,000 in compensatory damages.
5. With respect to the complaint, because defendant's acts and practices were willful, deliberate, intentional, reckless and malicious, \$500,000 in punitive damages.
6. With respect to the complaint, a preliminary and permanent injunction enjoining defendant from (a) interfering with the business relationship between plaintiff and its clients and (b) enjoining defendant from refusing to allow plaintiff access to the books and records of GRT for the purpose of auditing such books and records on behalf of plaintiff's clients.

Respectfully submitted,

ANDERSON RUSSELL KILL & OLICK, P.C.
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

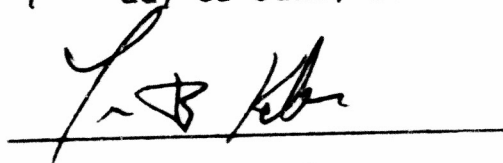
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRA HERZOG, being duly sworn, deposes and says that he is a partner in Herzog & Straus, that he has read and knows the contents of the foregoing complaint, dated June 18, 1976; and knows the contents thereof and that the same are true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.


IRA HERZOG

Sworn to before me this
11th day of June, 1976



LEON B. KELLNER
NOTARY
No. 11151
Qualified in N.Y.
Term Expires 12/31/77

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----x

HERZOG & STRAUS, a partnership	:	
organized pursuant to the laws	:	
of the State of New York,	:	<u>AFFIDAVIT OF SERVICE</u>
Plaintiff,	:	Index No. 11237/76
-against-	:	
GRT CORPORATION,	:	
Defendant.	:	

-----x

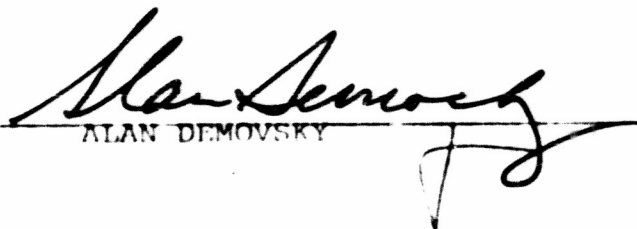
STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

ALAN DEMOVSKY, being duly sworn, deposes and says: he is employed by the law firm of Anderson Russell Kill & Olick, P.C.; is over the age of 18 years; is not a party to this action; and is a licensed New York City Process Server, License No. 728303.

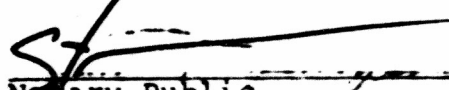
1. On the 18th day of June, 1976, at approximately 4:00 p.m., deponent served a true copy of an Order To Show Cause For Preliminary Injunction Without A Temporary Restraining Order, Summons and Verified Complaint, annexed hereto, upon Corporate Trust Company at 277 Park Avenue, New York, New York 10017, by personally delivering to and leaving same with Virginia Colvell, Assistant Secretary of the Corporate Trust Company. Corporate Trust Company is a registered agent authorized to accept service for GRT Corporation. Ms. Colvell is authorized to accept service. Ms. Colvell is a white female, approximately 55 years of age, 150 lbs., 5'3", blond hair and wears glasses.

EXHIBIT A TO PETITION FOR REMOVAL -
SUMMONS AND COMPLAINT

2. On the 18th day of June, 1976, at approximately 4:20 p.m., deponent served a true copy of an Order To Show Cause For Preliminary Injunction Without A Temporary Restraining Order, Summons and Verified Complaint by personally delivering to and leaving same with the law firm of Arrow, Silverman & Parcher, P.C., at 1370 Avenue of the Americas, New York, New York, leaving same with a person of suitable and discretion.


ALAN DEMOVSKY

Sworn to before me this
5 day of June, 1976.


Notary Public

Notary Public
New York

Commission Expires March 30, 1978

EXHIBIT B TO PETITION FOR REMOVAL -
ORDER TO SHOW CAUSE SIGNED JUNE 18, 1976

At a Special Term, Part II of the
Supreme Court of the State of New York,
Held in and for the County of New York
at 60 Centre Street on the 18 day of
June, 1976

PRESENT: Honorable

Justice

XAVIER C. RICCOBONO

HERZOG & STRAUS, a partnership
organized pursuant to the laws of
the State of New York,

Plaintiff,

-against-

GRT CORPORATION,

Defendant.

ORDER TO SHOW CAUSE FOR
PRELIMINARY INJUNCTION
WITHOUT A TEMPORARY
RESTRAINING ORDER

Index No. 11237/76

Upon the summons and complaint herein, verified the 18th day of June, 1976 and the affidavit of Ira Herzog, sworn to on 18th day of June, 1976, and sufficient reason appearing therefor, it is hereby on motion of Anderson Russell Kill & Olick, P.C., attorneys for plaintiff herein

ORDERED, that the defendant or its attorneys show cause before this Court at a Special Term, Part I thereof, to be held at the County Courthouse, located at 60 Centre Street on June 24, 1976 at 9:30 o'clock in the Fore noon of that day, or as soon thereafter as counsel can be heard, why a preliminary

EXHIBIT B TO PETITION FOR REMOVAL -
ORDER TO SHOW CAUSE SIGNED JUN 18, 1976

injunction should not issue herein enjoining the defendant, its agents, servants, employees and attorneys, pending the determination of this action, from in any manner, either directly or indirectly;

1. Interfering, in any manner whatsoever, with the business relationships existing between plaintiff and Arista Records, Inc., Publishers Licensing Corporation, Chrysalis Music Corporation and any other present or future clients of plaintiff;

2. Preventing plaintiff from auditing the books and records of the defendant and any of its divisions; and it is further

ORDERED that service of a copy of this Order, together with the papers upon which it is based, upon ^{Re} defendant ~~counsel, Arrow, Silverman & Parcher, P.C., 1370 Avenue of the Americas, New York, New York and upon Corporation Trust Company 277 Park Avenue, New York, New York, defendant's registered agent for service in New York County on or before 5:00 p.m. on June 21, 1976 shall be determined good and sufficient service hereof.~~

S/ RICCIBONO
J. S. C.

BEST COPY AVAILABLE

EXHIBIT B TO PETITION FOR REMOVAL -
 AFFIDAVIT OF IRA HERZOG IN SUPPORT OF ORDER TO SHOW
 CAUSE FOR PRELIMINARY INJUNCTION SWORN TO JUNE 18, 1976

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK

Herzog & Straus, a partnership
 organized under the laws of the
 State of New York,

Plaintiff,

-against-

GRT Corporation,

Defendant.

:
 : Affidavit in Support
 : of Order to Show Cause
 : for Preliminary
 : Injunction

:
 : Index No.
 :
 :

STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

IRA HERZOG, being duly sworn, deposes and says:

1. I am a partner of the certified public accounting firm of Herzog & Straus, plaintiff in this action.
2. I am fully familiar with the facts alleged in the complaint which I have verified in my capacity as a partner of Herzog & Straus and incorporate herein the allegations set forth in such complaint.
3. Plaintiff's primary business is the auditing, on behalf of its clients, of books and records of various companies in the music industry in order to insure that royalty payments that are required to be made to plaintiff's clients pursuant to contracts have been properly calculated and paid.

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRJ WZOG SWORN TO JUNE 18, 1976

4. It is my information and belief that on October 1, 1974, Bell Records, a division of Columbia Pictures Industries Inc., the predecessor company of Arista Records, Inc. ("Arista") entered into a contract with GRT Music Tapes ("GRT"), a division of GRT Corporation, which provided that GRT would manufacture tapes of various records produced by Arista. I understand that such contract provided that Arista could request that an audit be conducted of GRT's books and records by a certified public accountant chosen by Arista to determine whether proper royalties were being paid to Arista. In or about April, 1976 plaintiff was requested by Arista to conduct an audit of the books and records of GRT.

5. On April 19, 1976, Aaron W. Levy, the Financial Vice-President of Arista, sent a registered letter to GRT requesting an audit of the books and records of GRT pursuant to the October 1, 1974 contract. A copy of the letter is attached as Exhibit A hereto.

6. On April 23, 1976, plaintiff sent a letter to Mr. Tom Bonetti, Executive Vice President of the defendant, requesting that Mr. Bonetti contact plaintiff in order that a mutually convenient date could be arranged for the audit of GRT's books and records on behalf of Arista. In addition, the letter requested that an audit be arranged for two other companies, Publishers Licensing Corporation ("Publishers") and Chrysalis Music Corporation

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRA HERZOG SWORN TO JUNE 18, 1976

("Chrysalis"). A copy of the April 23, 1976 letter is attached as Exhibit B hereto.

7. Since the plaintiff, Arista, Publishers and Chrysalis had not received any written response from defendant, on May 11th plaintiff sent another letter to Mr. Bonetti again requesting that a mutually acceptable audit date be arranged for the three aforementioned companies. A copy of the May 11, 1976 letter is attached as Exhibit C hereto.

8. Subsequent to mailing the May 11th letter, plaintiff received a letter from the defendant dated May 10, 1976 acknowledging receipt of the April 23rd letter requesting the audit dates for Arista and Publishers. The letter further states that the defendant will not allow plaintiff access to the records necessary to perform such audits. The letter goes on to state that Arista and Publishers are free to make "alternative arrangements". I believe that GRT intended by such statement to advise plaintiff and its clients that any accounting firm other than plaintiff would be allowed the access necessary to perform the audits. For some reason the May 10th letter fails to respond to the request of the third corporation, Chrysalis, of which I am Secretary-Treasurer. A copy of the May 10, 1976 letter is attached as Exhibit D hereto.

9. It is clear from the May 10th letter that the defendant recognizes the rights of the three above-named companies to have audits performed on their behalf. The defendant's

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRA HERZOG SWORN TO JUNE 18, 1976

refusal to allow plaintiff to conduct audits as requested was arbitrary and capricious and has damaged and will irreparably injure plaintiff's business and interfere with its business relationships unless enjoined.

10. There is no conceivable justification for defendant's refusal to allow plaintiff to audit GRT's books and records. On the contrary, it clearly appears that defendant's refusal to allow access to GRT's books and records results from plaintiff's success as a result of previous audits of defendant and its divisions in uncovering massive underpayments of royalties owed to plaintiff's clients. For example:

a. In 1973, I was retained by Westbound Records, Inc. to perform an audit of Chess-Janus Records, Inc., ("Chess"), a company owned by GRT Corporation. The audit was a similar type of audit as now being requested by Arista. The audit on behalf of Westbound Records, Inc. and its affiliated publishers ("Westbound") was completed in late 1973 and uncovered a massive under-reporting of royalties owed to Westbound Records, Inc. by Chess. I understand that, as a result of such audit and updates of such audit and subsequent negotiations, GRT and Chess eventually paid or has agreed to pay Westbound approximately \$500,000.

b. In late 1974, plaintiff audited GRT on behalf of a number of clients including Publishers and Chrysalis. GRT eventually paid plaintiff's clients in sums ranging from \$10,000 to \$200,000.

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRA HERZOG SWORN TO JUNE 18, 1976

c. Additionally, in early 1975, plaintiff performed an audit on behalf of 20th Century Records, Inc. on another division of defendant, GRT of Canada, Ltd. That audit also uncovered a significant under-reporting of royalties amounting to 20% to 25% of the total royalties that should have been paid to 20th Century Records, Inc. I understand that this claim also was settled for a substantial payment to plaintiff's client.

11. Apparently, defendant, perturbed that plaintiff was cutting into defendant's profits by forcing defendant to fulfill its royalty obligations embarked on a concerted effort to destroy plaintiff's business by preventing it from auditing defendant and its various divisions.

12. In July 1974, another client of plaintiff, American Mechanical Rights Agency requested plaintiff to do an audit of defendant in order to determine that royalties due and owing to various clients of American Mechanical Rights Agency were properly being paid by the defendant. On or about July 12, 1974, Rosalie Miller, President of American Mechanical Rights Agency, received a call from a representative of defendant questioning the need for an audit of defendant. That representative further stated that if Ms. Miller decided that an audit was necessary, she should not use plaintiff. The representative failed to dissuade Ms. Miller and plaintiff performed the audit.

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRA HERZOG SWORN TO JUNE 18, 1976

13. Having been unable to persuade plaintiff's clients to voluntarily discontinue using plaintiff's services, defendant adopted the arbitrary and capricious practice of categorically refusing to allow plaintiff access to its books and records. In view of the fact that plaintiff's primary business is auditing various segments of the music industry, the intentional interference by defendant with the business relationships between plaintiff and its clients and potential clients has gravely damaged plaintiff and if allowed to continue will jeopardize the very existence of plaintiff.

14. Indeed, the consequences of defendant's actions described above are coming to fruition. Within the last two weeks plaintiff has received a telephone call from Mr. Aaron Levy, Financial Vice President of Arista. In essence, I was told that unless plaintiff could resolve its differences with defendant, Arista would have no other choice than to retain new accountants to perform the audit.

15. Similarly, a representative of Publishers, Mr. Phil Kurnit, has also contacted me and informed me that Publishers would also have to retain new auditors to perform the work previously done by plaintiff if plaintiff's differences with defendant were not resolved.

16. Finally, I have been put in the impossible position of having to fire plaintiff from doing the audit work for Chyrsalis of which I am Secretary - Treasurer as well as auditor. There is

EXHIBIT B TO PETITION FOR REMOVAL -
AFFIDAVIT OF IRA HERZOG SWORN TO JUNE 18, 1976

no justifiable reason why I should be required to hire new auditors to perform the audit on behalf of Chrysalis.

17. The damages to plaintiff as a result of defendant's conduct is immediate and substantial. If continued, plaintiff necessarily will lose a major portion of its clients and will suffer irreparable injury not compensable by any monetary recovery. On the other hand, there will be no injury or prejudice to defendant if it is required to allow plaintiff to perform audits since defendant recognizes that it must allow audits of its books for the purpose of determining the accuracy of royalty payments made to plaintiff's clients.

18. No previous application for the relief sought herein has been made. The reason this application is made by way of Order to Show Cause is that plaintiff requires immediate intervention by the Court because of the interference by defendant with plaintiff's daily operations and the imminent firing of plaintiff by its clients.

WHEREFORE, it is respectfully requested that defendant be enjoined from interfering with the business relationships existing between plaintiff and Arista, Publishers and Chrysalis and, further, that defendant be enjoined from preventing plaintiff from auditing the books and records of GRT.


IRA HERZOG

Sworn to before me this
17 day of June, 1976.


NOTARY PUBLIC

LEON G. MILLER
NOTARY PUBLIC, STATE OF NEW YORK
No. 3146 6/6/76
On "Not" in the "Not" County

6 BROADWAY,
NEW YORK, N.Y. 10019
2) 757-6081

EXHIBIT B TO PETITION FOR REMOVAL -
EXHIBIT A TO AFFIDAVIT OF IRA HERZOG

REGISTERED MAIL - RETURN RECEIPT REQUESTED

April 19, 1976

GRT Music Tapes
A division of GRT Corporation
1286 No. Lawrence Station Road
Sunnyvale, California 94086

Gentlemen:

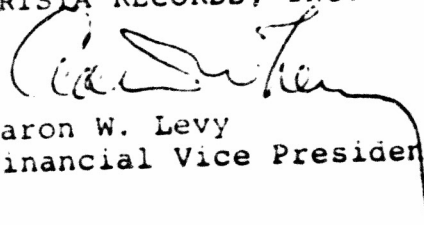
In accordance with our normal business policies and pursuant to paragraph 7.(b) of the agreement between GRT Music Tapes, a division of GRT Corporation, and Arista Records, Inc., successor in interest to Bell Records, a division of Columbia Pictures Industries, Inc., dated October 1, 1974, we hereby notify you of our intent to audit the books and records of GRT Music Tapes.

Please accept this letter as evidence of our authorization to the firm of Herzog & Straus, of 75 East 55th Street, New York, New York 10022, to represent us in conducting said audit. As per the provisions of paragraph 7.(b), we warrant that the audit will be conducted by a certified public accountant, who will not be employed on a contingent fee basis.

You will be contacted by a member of Herzog & Straus, who will arrange a mutually convenient time to conduct their audit. I am sure you will afford them every cooperation.

Very truly yours,

ARISTA RECORDS, INC.


Aaron W. Levy
Financial Vice President

AWL:fl

cc: E. Goldman
M. Rosnick

EXHIBIT A

EXHIBIT B TO PETITION FOR REMOVAL -
EXHIBIT B TO AFFIDAVIT OF IRA HERZOG

Herzog & Straus

Certified Public Accountants

75 EAST 55TH STREET
NEW YORK, NEW YORK 10022
(212) 751-4850

Ira Herzog, C. P. A.
Seymour Straus, C. P. A.

April 23, 1976

Mr. Tom Bonnetti
General Recorded Tape Corporation
2525 Lawrence Station Rd.
Sunnyvale, California

Dear Mr. Bonnetti,

We have been requested by the companies listed below
to audit your books and records with reference to royalty
statements submitted to them by G.R.T.

1. Arista Records
2. Publishers Licensing Corporation
3. Chrysalis Music Corporation

Will you please contact me so that a mutually agreeable
audit date may be arranged.

Very truly yours,


IRA HERZOG

IH/rv

cc.: Aaron Levy
Phil Kurnit

EXHIBIT B

EXHIBIT B TO PETITION FOR REMOVAL -
EXHIBIT C TO AFFIDAVIT OF IRA HERZOG

Herzog & Straus
Certified Public Accountants
75 EAST 55TH STREET
NEW YORK, NEW YORK 10022
(212) 751-4850

Ira Herzog, C. P. A.
Seymour Straus, C. P. A.

May 11, 1976

Mr. Tom Bonnetti
General Recorded Tape Corp.
2525 Lawrence Station Road
Sunnyvale, California

Dear Mr. Bonnetti:

To date, we have received no reply to our request for a mutually acceptable audit date. Will you please contact me with regard to this matter. We are enclosing a copy of our authorization to Blendingwell Music, Inc.

Blendingwell
Very truly yours,

IRA HERZOG

III/rv

enclosure

cc.: Aaron Levy
Phil Kurnic

EXHIBIT C

EXHIBIT B TO PETITION FOR REMOVAL -
EXHIBIT D TO AFFIDAVIT OF IRA HERZOG

May 10, 1976

Herzog & Strauss
75 East 55th Street
New York; N.Y. 10022

Dear Mr. Herzog:

I am in receipt of your April 23rd letter which requests audit dates for Arista Records and Publishers Licensing Corp.

GRT Corporation will not allow your firm access to confidential records that would be necessary for you to conduct such an audit. I have notified Arista and Publishers Licensing of GRT's position and assume they will be making alternative arrangements.

Cordially,

Tom Bonetti
Tom Bonetti
Executive Vice President

TB/lis

CC: Mr. Aaron Levy, Arista Records
Mr. Phil Kurnit, Publishers Licensing
Mr. Allen Arrow
Mr. Alan Bayley

EXHIBIT D

AFFIDAVIT OF LEONARD WARE IN OPPOSITION TO APPLICATION FOR
PRELIMINARY INJUNCTION, SWORN TO JUNE 23, 1976

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X	
HERZOG & STRAUS, a partnership)
organized pursuant to the laws of)
the State of New York,)
)
Plaintiff,)
)
-against-)
)
GRT CORPORATION,)
)
Defendant.)
-----X	

Index No. 11237/76

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEONARD WARE, being duly sworn, deposes and says:

1. I am an attorney at law licensed to practice in the State of California. I am a member of the firm of Ware, Fletcher & Freidenrich, located at 525 University Avenue, Palo Alto, California 94301. My firm acts as general counsel to GRT Corporation (hereinafter "GRT") and I personally am a director and the corporate secretary of GRT. Accordingly, I am familiar with the facts and circumstances relating to the instant application.

2 This affidavit is submitted in opposition to the application of plaintiff for a preliminary injunction enjoining GRT, its agents, servants, employees and attorneys, pending the determination of this action, from in any manner, either directly or indirectly:

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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a) interfering in any manner whatsoever, with the business relationships existing between plaintiff and Arista Records, Inc., Publishers Licensing Corporation, Chrysalis Music Corporation and any other present or future clients of plaintiff, and

b) preventing plaintiff from auditing the books and records of the defendant and any of its divisions.

THE FACTS

3. Plaintiff is an accounting firm which seeks to preserve and secure fees by auditing GRT's books and records on behalf of third parties. The third parties to which plaintiff refers either have contracted with GRT to manufacture, sell and distribute pre-recorded magnetic tapes of master recordings embodying the performances of recording artists signed to contracts with third parties or have issued GRT mechanical licenses entitling GRT to sell pre-recorded tapes embodying the performances of musical compositions to which such companies hold the copyright. Each of the agreements contain a provision which entitles the contracting companies to audit the books and records of GRT for purposes of verifying royalty payments paid and to be paid by GRT. None of such contracts contains any provision denominating plaintiff as the party to conduct the audit; nor is plaintiff a third party beneficiary to any such contract.

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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4. With respect to all three of the contracting companies referred to in the complaint, GRT has communicated its desire that the audit be conducted by a certified public accounting firm other than plaintiff; the reasons therefor originate in past audits conducted by plaintiff which have caused GRT grave concern with respect to the business and accounting practices of plaintiff. GRT therefore believes that its preference, when possible, to have reputable accounting firms other than plaintiff audit its books and records on behalf of third parties, is entirely justified.

5. GRT has no intention of dishonoring its contractual audit obligations to third parties and is prepared to open its books and records whenever it is contractually obliged to do so. It must be emphasized, however, that to date no company has complained to GRT or to this Court regarding GRT's opposition to plaintiff's conducting audits of its books and records on behalf of others. On the contrary, as plaintiff concedes in paragraphs 8 and 20 of the complaint and in paragraphs 14 and 15 of the Herzog affidavit, contracting companies are apparently willing to utilize the services of others for such purpose.

6. Plaintiff's application is two-fold. In essence it seeks:

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

-3-

4. With respect to all three of the contracting companies referred to in the complaint, GRT has communicated its desire that the audit be conducted by a certified public accounting firm other than plaintiff; the reasons therefor originate in past audits conducted by plaintiff which have caused GRT grave concern with respect to the business and accounting practices of plaintiff. GRT therefore believes that its preference, when possible, to have reputable accounting firms other than plaintiff audit its books and records on behalf of third parties, is entirely justified.

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6. Plaintiff's application is two-fold. In essence it seeks:

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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a) to restrict GRT's right to discuss its preference for the selection of accountants other than plaintiff to audit its books and records in advance of a judicial determination that it is doing so wrongly; and

b) an order compelling GRT in the absence of litigation or even a complaint by the real parties in interest to permit plaintiff to audit its books and records on behalf of third parties.

Nowhere in plaintiff's complaint is it alleged that there is no adequate remedy at law and it would appear that since plaintiff's grievance is fully compensable by a monetary recovery in the event of success after trial that there is no equitable basis for the instant application. In any event, for constitutional and jurisdictional reasons, the application should fail on the law as well as on the equities.

THE LAWFirst Part of Plaintiff's Application

7. Although the first part of plaintiff's application is broad and vague, it is apparent that plaintiff is requesting this Court to order a prior restraint on the free speech of GRT

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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and its representatives and thereby infringe on liberties guaranteed by the First Amendment to the Constitution of the United States. Regardless of the truth or falsity of plaintiff's allegations and the justification or lack thereof for defendant's conduct, all of which will be determined at a trial, the potential resultant adverse effect on plaintiff's business, if proven, could be compensated monetarily and it is inconceivable that the facts and circumstances alleged herein would result in this Court granting such a drastic remedy.

Second Part of Plaintiff's Application

8. The second part of plaintiff's application seeks the enforcement of a right, i.e. the right to conduct the audit of GRT's books and records. Yet, the right to an audit derives from a contract to which plaintiff is admittedly not a party and the language of which entitles the contracting party, not plaintiff, to designate any auditor it may choose to perform the audit. Not being a party to the agreement nor a third party beneficiary thereof, plaintiff has no standing in law or equity to seek this relief because it is not a real party in interest and has failed to establish jurisdiction to entertain this part of the application.

9. Ironically, the real parties in interest with respect to audit rights all appear willing to abide by GRT's preferences and are not seeking the relief to which plaintiff without standing, claims to be entitled.

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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ADEQUACY OF LEGAL REMEDIES

10. This motion by plaintiff is nothing more than an attempt to salvage fees for services which it hopes to render. Plaintiff claims that it will lose \$30,000 in fees if it is not permitted to audit the books and records of GRT with respect to known potential clients and claims that the result of GRT's activities will damage it to an extent of an additional \$100,000. In addition, plaintiff seeks \$500,000 in punitive damages. It is inconceivable in the face of these claims for monetary relief that any claim could be made that plaintiff is without an adequate remedy of law. In any event, this Court has consistently responded to claims similar to plaintiff's by awarding money damages after trial in the event plaintiff prevails on the merits and not by acquiescing to an application for the drastic remedy of a preliminary injunction.

PROBABILITY OF SUCCESS

11. For the constitutional and jurisdictional reasons set forth above, and the applicable points of law set forth in the memorandum filed simultaneously herewith, plaintiff has little chance of convincing a court after trial to issue a permanent injunction wholly apart from the monetary relief which plaintiff seeks in its complaint.

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

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BALANCING OF THE EQUITIES

12. GRT believes that it has done nothing actionable by indicating to contracting parties its preference for the employment of auditors other than the plaintiff for the purpose of examining GRT's books and records. It is also convinced that the reasons for such preference are wholly justifiable as a result of past experiences with the plaintiff. GRT fears that the disclosure of its business records to plaintiff will damage GRT's relationships with auditing parties and others, and that such damage may not be quantifiable monetarily.

13. If the plaintiff's application for relief were to be granted, GRT's ability to litigate the merits of its position will be effectively precluded. Stated otherwise, if the audits sought by plaintiff are accomplished by means of the injunction sought in this proceeding, the several defenses to plaintiff's claim of right to conduct such audits, all of which are believed to be meritorious, will be lost forever.

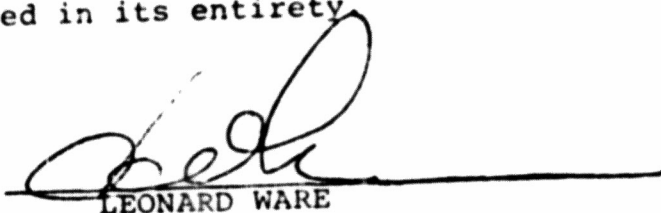
14. On plaintiff's side, it is already demonstrated that it can quantify its alleged monetary damages and that it therefore has adequate remedies at law.

AFFIDAVIT OF LEONARD WARE, SWORN TO JUNE 23, 1976

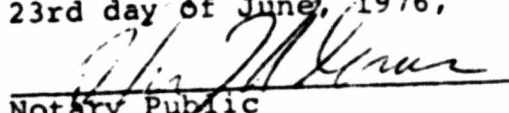
-8-

CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the application of the plaintiff for a preliminary injunction be denied in its entirety.


LEONARD WARE

Sworn to before me this
23rd day of June, 1976,


Notary Public

Notary Public, State of New York
No. 31-6682640
Qualified in New York County
Commission Expires March 30, 1977

TRANSCRIPT OF SESSION OF JUNE 28, 1976

bbmch

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

-----x
HERZOG & STRAUSS, a partnership, :

Plaintiff, :

v. :

76 Civ. 2790

GRT CORP., :

Defendant. :

-----x

Before: HON. WHITMAN KNAPP, District Judge.New York, New York
June 28, 1976 - 2:00 p.m.

Appearances:

ANDERSON, RUSSELL, KILL & OLICK, P.C.,

Attorneys for Plaintiff,

By: JEROLD OSHINSKY, Esq., and

LEON B. KELLNER, Esq.,

of Counsel.

L. PETER PARCHER, Esq.,

Attorney for Defendant.

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2 (In open court)

3 THE CLERK: Herzog & Strauss, a partnership,
4 v. GRT Corporation, a hearing for an order to show
5 cause.

6 MR. OSHINSKY: We represent the plaintiff.
7 My name is Jerold Oshinsky. I'm a member of Anderson,
8 Russell, Kill & Olick, and I'm here with my colleague,
9 Leon B. Kellner, on behalf of the plaintiff, Herzog &
10 Strauss, a certified public accounting firm.

11 The defendant record company, GRT, is represented
12 by Mr. Peter Parcher.

13 THE COURT: You are asking for a preliminary
14 injunction?

15 MR. OSHINSKY: That's correct.

16 THE COURT: Before we start that, I'd like
17 to explore with you whether you have a cause of action at
18 all.

19 Your complaint sets forth the causes of
20 action all right because it says that for the sole purpose
21 of injuring the plaintiff, and for no other purpose, it
22 says in effect that the defendant has taken his action of
23 refusing to let plaintiff into his premises.

24 Your affidavit in support of your motion for
25 preliminary injunction postulates the theory that the

TRANSCRIPT OF SESSION OF JUNE 28, 1976

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2 reason plaintiff is doing that -- defendant, I'm sorry --
3 the reason defendant is taking this action is to protect
4 itself from your expertise, is what it says in substance.

5 You say that the reason you postulate the
6 defendant is taking his action is because you have found
7 derelictions in other similar operations, and that they
8 are afraid you are going to find derelictions in his
9 operations.

10 If that is true, you have no reason for a
11 cause of action. The only way you can sustain that
12 cause of action is to prove the sole purpose of the defen-
13 dant in taking his action is to hurt you, that he has
14 no self-interest of his own that he is serving.

15 Obviously, the desire to keep you from
16 finding out he is a crook is not a motivation to hurt you,
17 but a motivation to protect himself; then you have no cause
18 of action.

19 MR. OSHINSKY: He has no legal basis --

20 THE COURT: That's neither here nor there.

21 MR. OSHINSKY: -- for keeping this plaintiff
22 accounting firm off of his premises.

23 THE COURT: A prima facie tort under New York
24 law, by which we are bound, is made out only if his
25 motive is solely to injure you and not to protect himself.

TRANSCRIPT OF SESSION OF JUNE 28, 1976

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2 MR. OSHINSKY: I don't profess to be an
3 expert in the doctrine of prima facie tort, but --

4 THE COURT: That is what you are saying.

5 MR. OSHINSKY: The theory as we explain in
6 the memorandum that we delivered to chambers this morning
7 in support of the theory underlying the plaintiff's
8 cause of action, the theory of our case is interference
9 with advantageous business relationships between this
10 plaintiff accounting firm and its clients.

11 THE COURT: The only way you can establish
12 that theory is to show that it was malicious.

13 MR. OSHINSKY: We establish a prima face
14 cause of action, your Honor, under our concept of the
15 law, by showing the interference.

16 The New York cases, as we read them, impose
17 a burden of justification of the interference on the
18 defendant.

19 THE COURT: It doesn't have to be justification
20 in the sense it has to be morally right. On the contrary,
21 it can be morally wrong. All that needs to be shown is
22 that it is a selfish motive, and not a motive merely to
23 injure you.

24 MR. OSHINSKY: As I understand the law, your
25 Honor, the justification cannot be an unlawful justification.

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2 and in this case the justification is totally unlawful
3 as we understand the law.

4 THE COURT: That is not true.

5 MR. OSHINSKY: If I might, let me read one
6 quotation which I think is characteristic of a myriad
7 of similar authority. This is set forth at page 8
8 in our memorandum, and it's from a New York State
9 authority.

10 The name of the case is Tappan Motors, where
11 there was interference.

12 That's one of the famous lemon cases where
13 a man bought a car from a dealer. The car was a lemon.
14 He parked the lemon in front of the dealer's facility
15 with a lemon hanging from the license plate, trying to
16 disparage the plaintiff's business.

17 THE COURT: What benefit was he trying to
18 get for himself from that conduct?

19 MR. OSHINSKY: I don't know.

20 The theory that the Court espoused in that
21 case, your Honor, is very plain and very appropriate here.

22 The Court said, and I quote, "The right
23 to carry on lawful business without obstruction is a
24 property right, and acts committed without just cause or
25 excuse, without just cause or excuse, which interfere

TRANSCRIPT OF SESSION OF JUNE 28, 1976

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2 with the carrying on of plaintiff's business or destroy
3 its custom, its credit, or its profits, do an irreparable
4 injury and thus authorizes the issuance of an injunction."

5 The key is "just cause or excuse," and there
6 is no just cause or excuse here.

7 THE COURT: You can't read that sentence
8 that way. "Just cause" doesn't mean cause you and I
9 would think is just. All it means is legitimate, in
10 the sense that it's for his own self-interest. He is
11 acting exclusively for his own self-interest. He doesn't
12 want you to prove that he is a crook.

13 I don't have to pass on that now. For the
14 present purposes, we assume he is a crook.

15 MR. OSHINSKY: In the famous American Tobacco
16 Advanced Music case where American Tobacco was sponsoring
17 the Hit Parade program, and the plaintiff was either the
18 publisher or the performer of songs which they claimed
19 were improperly being kept off the Hit Parade program,
20 they contended that the songs should not have been kept
21 off, should have been played as part of the Top Ten records
22 of the era.

23 In that context, the New York Court of
24 Appeals held, and I quote from 296 N.Y., page 83, "Thus,
25 in sum and substance, the second cause of action constitutes

TRANSCRIPT OF SESSION OF JUNE 28, 1976

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2 a statement to this effect. The defendants are wantonly
3 causing damage to the plaintiff by a system of conduct
4 on their part which warrants an inference that they intend
5 harm of that type."

6 So read, the cause of action is, we think,
7 adequate in the auspices of plaintiff's pleadings.

8 THE COURT: No selfish benefit to themselves.
9 If they had alleged in that case that the reason they
10 didn't put plaintiff's tunes on was because they thought
11 plaintiff's tunes would hurt their program, the complaint
12 would have been dismissed.

13 They said they didn't put -- the allegation
14 was they didn't put plaintiff's tunes on to hurt plaintiff.

15 Your complaint makes the allegation, but
16 your affidavit belies it, so --

17 MR. OSHINSKY: I do not believe, standing
18 here, your Honor, that it's a correct interpretation of
19 New York law that the alleged excuse which purportedly
20 justifies an interference with contractual relations
21 can be an improper or unlawful excuse.

22 THE COURT: Then we are at issue, and
23 the Court of Appeals should decide this question. There
24 is no point in wasting a lot of time with a lot of papers,
25 so I will accept your statements of what the facts are,

TRANSCRIPT OF SESSION OF JUNE 28, 1976

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2 namely, that you believe, and all you could allege to
3 defend a motion for summary judgment would be that his
4 purpose in keeping you out of his premises was to prevent
5 you from proving that he was a thief.

6 That was his purpose, wasn't it?

7 MR. OSHINSKY: That is our impression of
8 what his purpose was.

9 THE COURT: I am assuming that that is what
10 you are alleging.

11 MR. OSHINSKY: We think it goes beyond that.

12 If I may, your Honor, Mr. Ware, who is the
13 secretary and director and general counsel of this
14 organization, of GRT, put an affidavit into the State
15 court proceeding before the action was removed, and he
16 made statements in that affidavit, and I have a copy here,
17 which I don't know if your Honor has seen.

18 I have asked for permission, your Honor,
19 for you to treat it as if it was filed here.

20 THE COURT: That will be. The affidavit
21 will be received in evidence as Plaintiff's Exhibit 1.

22 MR. OSHINSKY: We offer it as Plaintiff's 1,
23 your Honor. Thank you.

24 Do you want to mark this copy?

25 THE COURT: Why don't you mark it?

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2 What particular language?

3 MR. OSHINSKY: In particular, your Honor,
4 under paragraph 3 there is a reference to the agreements
5 between the defendant record company and the clients of
6 the plaintiff who have requested the plaintiff accounting
7 firm to do an audit on their behalf, and there is a
8 sentence in paragraph 3, and I quote:

9 "Each of the agreements contain a provision
10 which entitles the contracting companies to audit the books
11 and records of GRT for purposes of verifying royalty
12 payments paid and to be paid by GRT."

13 And in paragraph 8, the affiant states in
14 the second sentence thereof, and I quote:

15 "The right to an audit derives from a contract
16 to which plaintiff is admittedly not a party (we concede
17 we are not a party to the contract), and the language
18 of which entitles the contracting party" --

19 THE COURT: Paragraph 8?

20 MR. OSHINSKY: Paragraph 8 on page 5, your
21 Honor, the second sentence.

22 -- "derives from a contract to which plaintiff
23 is admittedly not a party, and the language of which
24 entitles the contracting party, not plaintiff, to designate
25 any auditor it may choose to perform the audit."

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2 This is conceded by GRT pursuant to the
3 authority in those contracts.

4 The accountants, Herzog & Strauss' clients,
5 designated them to perform the audit.

6 We believe that this language creates a legal
7 right in plaintiff's clients to designate the plaintiffs
8 to perform the audit, and that there is no basis under
9 these contracts or common law for GRT to keep this auditing
10 firm out of its premises, and we think that the juxta-
11 position of the contract, and we don't have a copy of the
12 contract so we are inferring its provisions from what
13 Mr. Ware has told us the contract say., confirms our
14 belief.

15 We think the juxtaposition of the contract,
16 together with our understanding of the common law, at
17 a minimum, at a minimum, creates very serious questions
18 of law, and under the standards in the Second Circuit,
19 such as the Charlie Girls case, we believe that we have
20 amply fulfilled the standard for an injunction in the
21 Second Circuit.

22 That is at least a serious question coupled
23 with a demonstrably tipping of the balance of hardship
24 to the plaintiff because if we take this to its logical
25 extreme, if a record company in the position of GRT could

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2 bar its door to an accounting firm, such as Herzog &
3 Strauss, we must keep in mind that this is a very close-knit
4 industry. The word spreads like wildfire, and if
5 this record company could succeed in this type of what
6 we consider to be unlawful conduct, there is no end to this
7 type of practice in our view, and this is the major concern
8 that our clients have, that if the door is barred to them
9 here this is going to reverberate through the industry,
10 and it's going to have a demonstrably serious effect on
11 their business, and they have expressed to me that they do
12 have the fear that this could have the ultimate result
13 of destroying their currently very successful auditing
14 business, and there is no justification in the law or in
15 fact, your Honor, we believe for this type of conduct,
16 but even if we are not clearly right as a matter of law,
17 we believe we have raised serious questions, and coupled
18 with the balance of hardships which we have shown in
19 our papers, we think that amply justifies the issuance
20 of an injunction, and we have seen nothing from the
21 other side.

22 We haven't heard the first word of justifi-
23 cation for this type of unlawful conduct, and we think
24 that under the circumstances an injunction is warranted.

25 THE COURT: You and I differ on a narrow

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2 point of what New York law is, and so there is no point
3 in your wasting a lot of time with formal papers estab-
4 lishing what you have just said.

5 On the basis of your admission that your
6 theory is that the defendant did this in order to keep
7 your client from proving him to be a crook, that was
8 his motivation for doing this, that's how I read your papers
9 and that's how I hear what you tell me -- on that basis,
10 I just heard your opponent make a motion for summary
11 judgment, and that motion is granted.

12 Defendant will prepare an order of judgment.

13 MR. OSHINSKY: Thank you, your Honor.

14 THE COURT: If I am wrong, the Court of
15 Appeals will set me right, I'm very sure.

16 MR. PARCHER: If your Honor pleases, I'm very
17 loath to make any comments in view of your Honor's ruling.
18 I'm just wondering, on the assumption my adversary is
19 going to take this matter up, if it wouldn't be in my
20 client's best interests to give you the other reasons why
21 you should not have granted his motion.

22 MR. OSHINSKY: We'd be very happy to hear
23 them, your Honor.

24 THE COURT: It will just confuse the
25 record.

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2 If there are other reasons, I will entertain
3 them if the Court of Appeals tells me I am wrong.

4 MR. PARCHER: Let the record then reflect
5 that I am not commenting, not because I agree with
6 anything the plaintiff has said in his papers, but in view
7 of the Court's ruling.

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MEMORANDUM AND ORDER #44741, DATED JULY 8, 1976

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERZOG & STRAUS, a partnership
organized under the laws of the
State of New York,

Plaintiff,

- against -

GRT CORPORATION,

Defendant.

MEMORANDUM AND ORDER

76 Civ. 2790

KNAPP, D.J.

On oral argument in this diversity action, plaintiff's counsel expressly stated that defendant had excluded plaintiff from its premises for the express purpose of avoiding an audit performed by plaintiff which might have shown defendant to be a crook. Transcript, at 8, 12. By thus conceding that defendant had a selfish motive for its conduct, plaintiff has conclusively established that it has no cause of action in prima facie tort. Benton v. Kennedy-Van Saun Mfg. & Eng. Corp. (1st Dept., 1956) 2 A.D.2d 27, 152 N.Y.S.2d 955. As Mr. Justice Botein there observed (at 958):

"Defendant's self-interest negatives malice, even though the means employed might be of questionable morality and ethical validity."

Defendant's motion for summary judgment is, accordingly, granted.

SO ORDERED.

Dated: New York, New York

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUL 12 1976

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44741

[Handwritten signature]

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
Herzog & Straus, a partnership :
organized under the laws of :
the State of New York :

Plaintiff :

-against- :

GRT Corporation :

Defendant. :

-----x

NOTICE OF APPEAL

76 Civ. 2790 (WK)

NOTICE is hereby given that Herzog & Straus, plaintiff herein, appeals to the United States Court of Appeals for the Second Circuit from the order entered on July 12, 1976 granting summary judgment in favor of the defendant, GRT Corporation.

Dated: New York, New York
July 23, 1976

Anderson Russell Kill & Olick, P.C.

By 

A Member of the Firm

Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10020
(212) 397-9700

TO: Clerk of the Court
United States District Court
Southern District of New York
Foley Square
New York, New York

Arrow Silverman & Parcher, P.C.
Attorneys for Defendant
1370 Avenue of the Americas
New York, New York

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

HERZOG & STRAUS,

Plaintiff-Appellant,

- against -

GRT CORPORATION,

Defendant-Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 7th day of Sept 1976 at 1370 Avenue of the Americas
New York, N. Y.

deponent served the annexed appendix

upon

Arrow, Silverman & Parcher

the attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein.

Sworn to before me, this 7th
day of Sept 1976

Beth A. Hirsch

BETH A. HIRSH
NOTARY PUBLIC, State of New York
110-114-11000
Qualified in Queens County
Commission Expires March 30, 1978

Victor Ortega
VICTOR ORTEGA